

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JD

RICHARD ABOOD,

Plaintiff,

vs.

Case No. 2005-4324-NI

RUSSELL STRAH,

Defendant.

OPINION AND ORDER

Plaintiff and defendant have both filed motions for partial summary disposition pursuant to MCR 2.116(C)(10).

Plaintiff filed this complaint on October 27, 2005, and filed an amended complaint on March 20, 2006. Plaintiff alleges that, on May 14, 2005, defendant's dog attacked him and "brutally bit, clawed and generally maimed" him. Plaintiff therefore brings statutory and common law claims for dog bite.

Both parties have brought their motions for summary disposition pursuant to MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The motion must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The court must consider all this supporting and opposing material. MCR 2.116(G)(5); and see *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000). If the opposing party fails to present documentary



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evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

In support of his motion for summary disposition, plaintiff claims that the only defense to a statutory dog bite claim is provocation, while the only comparative negligence which can be considered is whether the victim was a trespasser. Plaintiff points out that he clearly was not a trespasser on defendant's property. Plaintiff also argues that there is no way defendant can establish that plaintiff provoked defendant's dog. Therefore, plaintiff seeks partial summary disposition as to defendant's liability under MCL 287.351.

Defendant, in response to plaintiff's motion and in support of his own motion for partial summary disposition, notes that provocation is a complete defense in any dog bite action under MCL 287.351. Defendant argues that the plaintiff's own deposition testimony clearly indicates that he provoked defendant's dog. Therefore, defendant also seeks partial summary disposition as to his liability for plaintiff's statutory dog bite claim.

MCL 287.351(1) provides that, "[i]f a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness." Provocation requires either "some action directed toward the animal or, if not, the animal's response must be proportional to the victim's action." *Bradacs v Jacobone*, 244 Mich App 263, 276; 625 NW2d 108 (2001). An individual may even "commit unintentional acts that are sufficiently provocative to relieve a dog owner of liability under the dog-bite statute." *Brans v Extrom*, 266 Mich App 216, 221; 701 NW2d 163 (2005).

In the case at bar, the Court is satisfied that there is no genuine issue of material fact precluding summary disposition pursuant to MCR 2.116(C)(10). Accepting plaintiff's allegations as true, plaintiff attempted to corner defendant's dog once it had run out of the house. Plaintiff acknowledges that the dog resisted following plaintiff back to defendant's house. Defendant's Exhibit A, Deposition of Richard Abood at 40. Nevertheless, plaintiff attempted to lead the dog back to the house by the collar. Plaintiff acknowledges that he was aware that the dog had never been trained to walk on a leash. *Id.* at 47. He also acknowledges that he knew "the dog was somewhat under stress, because its true owner had just passed on." *Id.* Plaintiff admits that, as he grabbed hold of the collar, the dog became agitated and began scratching him, pawing at him, and "trying to bite" him. *Id.* at 40-41. However, plaintiff refused to let go of the dog. It was only after plaintiff had engaged in these manifestly provocative actions that the dog bit him. Under these circumstances, the Court is satisfied that there is no genuine issue of material fact as to whether plaintiff provoked the dog, thereby precluding his recovery under MCL 287.351(1).

For the reasons set forth above, plaintiff's motion for partial summary disposition is DENIED and defendant's motion for partial summary disposition is GRANTED. Plaintiff's count I, for statutory dog bite, is DISMISSED. Pursuant to MCR 2.602(A)(3), this Opinion and Order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

Dated: July 5, 2006

CC: Douglas S. Dovitz
Patrick J. MacLean

DONALD G. MILLER
Circuit Court Judge

DONALD G. MILLER
CIRCUIT JUDGE

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GARMELLA SABAUGH, COUNTY CLERK

BY: [Signature] Court Clerk